UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RONALD MELTON, et al.,	)	**Case No. C-1-01-528**
Plaintiffs,	:)	**(Judge Spiegel)**
-v-	:)	
BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO, et al.,	:) :)	
Defendants.	:)	

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION
TO CONSOLIDATE AND JOIN CLASS ACTION PROCEEDINGS

For their Memorandum in Opposition to Plaintiffs' Motion to Consolidate and Join Class Action Proceedings, Defendants Board of County Commissioners of Hamilton County, Ohio, Todd Portune, John S. Dowlin, Tom Neyer, Jr., and Robert Pfalzgraf, M.D. (collectively "Defendants") state as follows:

In light of Plaintiffs' past position with respect to consolidation, the instant motion to consolidate came as quite a surprise to Defendants. Indeed, contrary to Plaintiffs' current position, Plaintiffs have insisted throughout the course of this litigation that they have wanted nothing to do with any other related cases, including the class action proceedings with which Plaintiffs now seek consolidation. Defendants, on the other hand, requested consolidation of these cases more than a year ago. But this Court ruled that "Plaintiffs in this case have claims that they have the right to pursue independently of the claims in the Chesher case." (Melton Doc. # 62, at 1).

Without question, Plaintiffs don't have the unilateral option of deciding whether it wants to consolidate. Having chosen the non consolidation road, and the Court having so ordered, the Plaintiffs must now travel it. Defendants have rights too, and they therefore assert that the issue of consolidation should not be addressed until after this Court rules upon the various motions for summary judgment that have been filed by all of the defendants in this case. Per the Court's instruction, the parties proceeded with discovery in this case without regard to the class action proceedings. Such discovery has now ended, dispositive motions have been filed and, as set forth in the various motions, the record created during discovery reveals that Plaintiffs' case is completely without merit. Defendants have complied with this Court's instructions as to how this case should proceed and, therefore, are entitled to have this Court render a decision on their motion for summary judgment (Melton Doc. # 81-84) prior to considering whether consolidation is warranted at this late stage of the case.

By way of background, this action, in which Plaintiffs have asserted a purported federal civil rights claim pursuant to 42 U.S.C. § 1983, was filed on August 3, 2001 ("the Melton Action") (Melton Doc. # 1). On August 28, 2001, Jacqueline Chesher, Executrix of Robin Melton's Estate, filed an action styled *Jacqueline Chesher v. Tom Neyer, Jr., et al.*, Case No. C-1-01-566 ("the Chesher Action"), seeking damages for the alleged deprivation of rights, privileges and immunities secured by the Fourteenth Amendment pursuant to 42 U.S.C. § 1983. On November 7, 2001, Robert Willenbrink, and others, including Jacqueline Chesher, filed a purported class action styled *Willenbrink, et al. v. Hamilton County, Ohio, et al.*, Case No. C-1-01-771 ("the Willenbrink Action"), seeking damages for the alleged deprivation of rights, privileges and immunities secured by the Fourteenth Amendment pursuant to 42 U.S.C. § 1983, and various purported state law claims. All three cases were assigned to this Court.

On November 15, 2001, Ms. Chesher filed a motion to consolidate the Chesher Action with the Willenbrink Action. (Willenbrink Doc. # 2). On December 28, 2001, this Court issued an Order granting Ms. Chesher's motion and consolidated the Chesher Action and the Willenbrink Action finding that the two cases have common issues of law and fact and common Defendants. (Willenbrink Doc. # 14, at 1). The Court also determined that consolidation of the Chesher Action and the Willenbrink Action would further the interests of justice. (Willenbrink Doc. # 14, at 1).

On September 30, 2002, Defendants filed a motion requesting that this Court issue an Order consolidating the Chesher Action and the Willenbrink Action with the Melton Action, which was the first case filed with this Court and which has the lowest case number. (Melton Doc. # 44). Defendants maintained that all three actions involve allegations by the various plaintiffs arising out of the same set of alleged facts and circumstances, namely the alleged photography of certain corpses located at the Hamilton County Morgue. Defendants further argued that these cases would focus on the same factual and legal issues and discovery in all three cases would focus on the same essential documents and/or witnesses. Defendants believed that consolidation under such circumstances promoted judicial economy and that maintaining the actions separately would lead to duplicative efforts by both the Court and the parties.

Plaintiffs in this case opposed consolidation with the Chesher and Willenbrink Actions on the grounds that:

(1) consolidation would not further the interests of justice or promote judicial economy;

(2) there would be no duplicative efforts by the parties;

(3) "[t]he actions which Defendants seek to consolidate with this action involve a great deal more claimants than those within the instant action, seek class action certification which is not being sought by Plaintiffs in

this action, have claimants who have different interests than Plaintiffs herein, and seek dissimilar relief than that which is sought in this action;"

(4) at that time, the actions were at "decidedly different stages of procedure and discovery;"

(5) Plaintiffs somehow would be prejudiced by consolidation; and

(6) Defendants' purported delay in seeking consolidation alone was sufficient grounds for denying consolidation.

(Melton Doc. # 48) (copy attached hereto as Exhibit A). Plaintiffs even went so far as to attack Defendants themselves by stating the consolidation was sought only because Defendants wanted to "provide advantage to Defendants and disadvantage to Plaintiffs in this action."

After briefing on the issue was closed, Magistrate Judge Sherman issued an Order denying Defendants' motion. (Melton Doc. # 52). In his Order, Magistrate Judge Sherman found that the Melton Action was different from the class action in "significant respects: it was brought by different plaintiffs' counsel; it is not a proposed class action; and it concerns defendants' conduct, at the Hamilton County Morgue, with respect to one deceased individual only (Perry Melton)." (Melton Doc. # 52, at 2). Magistrate Judge Sherman also cited the differences in the procedural posture of the respective cases. (Melton Doc. # 52, at 2). Defendants then filed objections to the Magistrate Judge's Order in which they urged this Court to consolidate these cases. (Melton Doc. # 55). Plaintiffs filed their response in support of the Magistrate Judge's Order maintaining once again that judicial economy and "justice" mandated against consolidation. (Melton Doc. # 59) (copy attached hereto as Exhibit B). This Court ultimately ruled that consolidation was not warranted. (Melton Doc. # 62).

Now, almost one year later, Plaintiffs have filed their own motion to consolidate arguing that judicial economy requires consolidation. (Melton Doc. # 79). Plaintiffs disingenuously state that they have been engaging in discovery separate from the class action in an effort to determine whether they wanted to "opt" back into the class action and, based upon the record, now have decided to opt back in. Yet, noticeably absent from Plaintiffs' prior arguments against consolidation is any mention of their wish to "delay" their decision on whether they should "opt" into the class action until such time as they could undertake "discovery independent of the class action proceedings." Nowhere in their pleadings does it mention that Plaintiffs wished to conduct discovery solely to determine whether they wanted to opt back into the class action. This, of course, is because that never was Plaintiffs' intention. Indeed, Plaintiffs have made it very clear that they never intended to be associated with the class action proceedings in the Chesher/Willenbrink Actions. Thus, it is difficult to understand how Plaintiffs now can assert that this was their plan all along. If it was, Plaintiffs certainly did a nice job of keeping it a secret, and materially misled the Court. Again, Plaintiffs do not have this unilateral/everlasting consolidation option they are urging.

When viewed in the light of the procedural posture in this case, it becomes quite clear that Plaintiffs' current motion to consolidate is nothing more than a last-minute attempt to save an otherwise floundering case. If Plaintiffs truly intended to perform discovery and later make a decision with respect to opting back into the class action, certainly Plaintiffs could, and would, have made such a determination prior to merely a few days before the dispositive motion deadline. It is important to recognize that when Defendants filed their motion to consolidate more than a year ago, the procedural landscape of the case was quite different; at that time, all three actions were at similar stages of discovery and procedure. The parties in the Chesher and Willenbrink Actions had just completed discovery relating to class certification issues and the parties were set to begin merits discovery. Although five depositions had been taken in connection with Chesher and Willenbrink at that time, all but one related solely to class certification issues. Counsel for Plaintiffs in this action were invited to participate in the remaining deposition, but the invitation was declined. Now the cases are at decidedly different stages. Indeed, as noted above, other than the issues raised in Defendants' pending motion to compel, discovery in this matter is over and dispositive motions have been filed. This Court should not countenance Plaintiffs' obvious attempt to delay disposition of this case.

At the very least, Plaintiffs should be required to explain how the circumstances have changed since they opposed Defendants' motion for consolidation some fifteen months ago. Indeed, in their prior pleadings Plaintiffs made the following statement:

> Plaintiffs opine that the goals of consolidation; to wit, economy of time and effort for the court, for counsel, and for the litigants, will not be achieved by a consolidation of the other actions. Plaintiffs contend that rather than further the interests of justice, consolidation shall actually serve to impede justice for them. Consolidation will cause them to be disadvantaged. They nor their counsel should not be compelled to suffer through hours of discovery not related to their claims. They should not be compelled to suffer through expensive and unproductive discovery. To force such would be a disservice to Plaintiffs.

(Melton Doc. # 48). What exactly has changed since Plaintiffs made these statements? The truth of the matter is that formal discovery in the instant case now is over, all Defendants have filed their dispositive motions, a motion to compel currently is pending against Plaintiffs, trial in this case is set for July 6, 2004, and Plaintiffs finally have realized that their purported civil rights claim is without merit.

For these reasons, Plaintiffs' motion to consolidate should be denied. In the alternative, should this Court be inclined to grant consolidation, Plaintiffs should be required to reimburse Defendants for the expenses they incurred in defending this separate, yet duplicative, action, and for "suffering through expensive and unproductive discovery." Such unproductive discovery included, but certainly is not limited to, three duplicative depositions that already had been conducted in connection with the Chesher/Willenbrink Action, one additional deposition, and written discovery to which Plaintiffs still have not completely responded. Defendants should not be required to bear the expense of Plaintiffs' inappropriate gamesmanship.

Respectfully submitted,

/s/ Louis F. Gilligan

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HAMILTON COUNTY, OHIO, TOM NEYER, JR., JOHN S. DOWLIN and TODD PORTUNE, individually and on behalf of HAMILTON COUNTY, OHIO in their capacity as official representatives of the County, and ROBERT PFALZGRAF, M.D.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon David W. Kapor, 36 East Seventh Street, Suite 1520, Cincinnati, Ohio 45202; Michael B. Ganson, 36 East Seventh Street, Suite 1540, Cincinnati, Ohio 45202; Stephen J. Patsfall, Patsfall Yeager & Pflum LLC, Suite 2100, One West Fourth Street, Cincinnati, Ohio 45202; Larry E. Barbiere, Schroeder, Maundrell, Barbiere & Powers, 11935 Mason Road, Suite 100, Cincinnati, Ohio 45249; and Glenn V. Whitaker and Victor A. Walton, Vorys, Sater, Seymour and Pease, LLP, Atrium Two, 221 East Fourth Street, Cincinnati, Ohio 45202, by ordinary U.S. mail, this 12th day of February, 2004.

/s/ Louis F. Gilligan
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